SCOPE OF ACT – PENMAR DEVELOPMENT CORP. EXEMPT FROM SOME, BUT NOT ALL, PROVISIONS OF ACT – NOTICE REQUIREMENTS – DELIVERY OF NOTICE TO NEWS MEDIA REQUIRES AFFIRMATIVE ACT BY PUBLIC BODY – CHOICE OF SITE FOR POSTED NOTICE MUST BE CONSISTENT WITH PRIOR DESCRIPTION OF POSTING – COMPLIANCE BOARD – AUTHORITY AND PROCEDURES – BOARD LACKS AUTHORITY TO INTERPRET PUBLIC BODY'S BYLAWS BUT MAY INTERPRET SCOPE OF OPEN MEETINGS ACT EXEMPTION IN STATUTE CREATING PUBLIC BODY

October 1, 2004

Karl Weissenbach
The Cascade Committee

The Open Meetings Compliance Board has considered your complaints alleging that the Board of Directors of the PenMar Development Corporation ("PenMar") violated the Open Meetings Act by failing to give proper notice in advance of board meetings held on June 29 and July 26, 2004. The complaints also raised more general issues about PenMar's compliance with the Act.

For the reasons explained below, we conclude that PenMar is exempt from key provisions of the Open Meetings Act relating to closing its meetings but remains subject to certain of the Act's procedural requirements, including those pertaining to notice of meetings. We are unable to reach a conclusion, however, whether PenMar complied with the Act's notice requirements for the board meetings on June 29 and July 26.

I

Complaint, Response, and Supplemental Record

A. Complaints

The initial complaint, dated July 15, 2004, alleged that the PenMar failed to properly advertise a meeting that occurred on June 29, 2004. According to the complaint, the community learned of the meeting only after word of it was "leaked" to a Hagerstown newspaper, the *Herald-Mail*, resulting in an article appearing two days in advance of the meeting. When members of the public attended the meeting, according to the complaint, they apparently were questioned about their presence, because it was a closed meeting. A member of the PenMar board reportedly commented that the "leaked story" constituted the official notification of the meeting.

On July 20, the initial complaint was supplemented with a series of questions concerning PenMar's compliance with the procedural requirements of the Open Meetings Act: (1) Can the Board of Directors conduct a meeting without properly advertising it? (2) By what method and how far in advance must meetings be advertised? (3) Can the Board of Directors conduct a closed meeting without first meeting in an open session? (4) Can the Board of Directors vote in closed session? (5) Must the Board of Directors follow certain procedures to go into a closed meeting? (6) Finally, must the Board of Directors document that it held a closed meeting? Attached to the July 20 correspondence was an e-mail message from Richard Rook, Executive Director of PenMar, addressing, among other matters, the scheduling of the session that occurred June 29, which appears to acknowledge that the meeting was not advertised.[1]

On July 22, a supplement to the initial complaint questioned whether the content of a notice of a Board of Directors' meeting scheduled for July 26 and the method by which that notice was provided complied with the Act. It was alleged that a sign was posted at PenMar's headquarters at Fort Richie. The sign read: "Special CLOSED Meeting of the PMDC [i.e., PenMar's] Board of Directors, July 26, 2004, 7:30 A.M. Lakeside Hall, Cascade, MD." The supplemental complaint asked: (1) Can PenMar advertise this as a CLOSED meeting? (2) Considering that PenMar traditionally posted signs of public meetings throughout the community, should PenMar be required to at least post a sign that is more readily accessible, in a location that will ensure maximum participation? (3) Does the manner in which the sign was posted constitute a good faith effort by PenMar to notify the public of an upcoming meeting?

Recognizing that there is a question concerning the application of the Act to PenMar, the complaint noted that PenMar's bylaws, under the caption "Annual Meeting," provide "[m]eetings of the Board [of Directors] shall be subject to the Open Meetings Law and members of the public shall be entitled to attend all of these meetings." The complaint inquired whether this provision requires the Board of Directors to abide by provisions of the Open Meetings Act even if not statutorily required to do so.

B. Response

In a timely response on behalf of the PenMar Board of Directors, Richard D. Rook, Executive Director of PenMar, noted that PenMar's enabling statute exempts PenMar from §10-507 of the Open Meetings Act.[2] Article 83A, §5-1210(a),

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[1] The July 15 complaint was not initially received by the Compliance Board. However, a copy was included along with the material submitted on July 20.

[2] Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

Annotated Code of Maryland.[3] He acknowledged, however, that PenMar's bylaws provide that the meetings of the Board of Directors are subject to the Open Meetings Act. A copy of the bylaws was enclosed with PenMar's response.

According to the response, the board holds its regular meetings on the second Monday of each month at 7:30 A.M. These meetings are scheduled a year in advance and "are common knowledge to the surrounding communities and to the local news media." The response noted that, under the bylaws, special meetings of the board are called by the chairman, or in the chairman's absence, by the vice-chairman, or at the request of five members, and must be announced at least a week in advance of the meeting. Furthermore, the announcement must note the topic of the meeting.

According to PenMar's response, the special meeting held June 29 was called by the Vice-Chairman on June 22 and announced to the media on June 25. The meeting was described as a "closed meeting," not a "secret meeting" as suggested in the complaint. Citing §10-506(c),PenMar noted that notice may be given by delivery to representatives of the news media who regularly report sessions of the public body and enclosed a copy of a June 26 article from the *Herald-Mail* as evidence of such notice. As to notice of the July 26 meeting, the response indicted that "[i]t was the intent of the [PenMar] Board to ensure that the public was aware that the Board was meeting in closed session and that the public would not waste time and effort in attending a meeting which would be closed."[4]

PenMar noted that §10-508(a) permits a public body to meet in closed session for, among other reasons, consideration of a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State (§10-508(a)(4)), consultation with counsel to obtain legal advice (§10-508(a)(7)), and the discussion of matters relating to negotiating strategy or the contents of a bid or proposal, if public discussion would adversely impact the ability of the public body to participate in the competitive bidding or proposal process (§10-508(a)(14)). According to PenMar, the closed meetings held on June 29 and July 26 concerned these matters.

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[3] The specific wording is this: "[I]n exercising its corporate powers, the [PenMar Development] Corporation is exempt from the provisions of ... §10- 507 of the State Government Article ...." As the ellipses suggest, this subsection exempts PenMar from a variety of statutory provisions otherwise generally applicable to government entities, presumably because the General Assembly concluded that compliance with them would impede PenMar's ability to exercise its powers. *See* Part II below.

[4] In its response, PenMar also noted the recent addition of an "announcements/news" tab on its website, aimed at increasing public awareness of PenMar events and actions.

C. Supplement to Complaint

Prior to our consideration of the complaint, we asked PenMar to specifically address whether the procedures required under §§10-508(d) and 10-509(c)(2) were followed in connection with the closed meeting held on June 29, 2004. In response, PenMar provided a copy of its minutes of that meeting. Subsequently, we received a reply, in effect supplementing the complaint, addressing PenMar's response. The supplement alleged that the only reason the media became aware of the June 25 meeting was because a private citizen learned of the meeting and contacted a reporter. The reporter, in turn, contacted PenMar. According to your letter, "[o]nly after it became clear that the media and the Cascade Committee were aware of the 'special meeting' did [PenMar] grudgingly confirm to the media that such a meeting would take place..." The reply also asked for confirmation that State law allows public bodies to meet privately "when discussing the purchase of real estate, but not when the issue is selling public land ...." Attached to the reply were copies of articles from the *Herald-Mail*, including an article dated June 30, 2004, describing the June 29 session as an "unadvertised special meeting."

II

Application of Open Meetings Act

A. Role of Compliance Board

In considering the complaint and PenMar's response, we are mindful of the limits on our authority. We are instructed by the Open Meetings Act to "receive, review, and resolve complaints ... alleging a violation of the provisions *of this subtitle* [i.e., the Act] and issue a written opinion as to whether a violation has occurred." §10-502.4(a) (emphasis added). We have no authority to evaluate whether the provisions of PenMar's bylaws have been violated, albeit these bylaws currently incorporate the Open Meetings Act.[5] *See, e.g.*, 2 *Official Opinions of the Open Meetings Compliance Board* 31, 32 n. 3 (1998) (Opinion 98-9) (Compliance Board lacks jurisdiction to consider whether public body's action comported with its own rules.).[6] Consequently, in this opinion we rely on the Act itself as applied to PenMar by the General Assembly, not the bylaws that PenMar has applied to itself.

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[5] PenMar appears to have acknowledged that it has incorporated the Open Meetings Act in its bylaws, although it is not entirely clear whether that provision is intended to apply to all meetings or only to annual meetings of the Board. This is an interpretive issue left to PenMar and its counsel. In any event, the bylaws could be amended at any time during the course of "any duly organized meeting of the Board." PenMar Development Corporation Bylaws, Article VII.

[6] For brevity's sake, we shall henceforth refer to the volumes of our prior opinions as *OMCB Opinions*.

Given what we have just said about the limits on our authority, we ought to explain here why we shall shortly engage in a detailed interpretation of a statutory provision outside the Open Meetings Act, namely the exemption in PenMar's statute. The reason is that we cannot carry out our task – discussing the application of the Act's requirements to PenMar in the context of the complaint – unless we first discern which provisions apply to PenMar and which do not. This inquiry, in turn, inevitably leads us to consider what the General Assembly sought to do when it granted the exemption.[7]

B. Uncertain Meaning of the Exemption's Text

When the General Assembly established PenMar in 1997, it granted an exemption from certain laws normally applicable to governmental entities. *See* Article 83A, §5-1210, Annotated Code of Maryland. The pertinent aspect of the provision is the exemption from §10-507, which, among other things, grants the general public the right to attend "[w]henever a public body meets in open session."[8] Whatever else may be said about the scope or intended effect of this provision, it is clear that PenMar was not granted a blanket exemption from the Act as a whole.[9] Indeed, an exemption from §10-507 alone is puzzlingly incomplete, or at least uncertain in its effect, given that the exemption does not mention §10-505, which provides that "[e]xcept as otherwise expressly provided in [the Open Meetings Act], a public body shall meet in open session."

To understand the intended effect of PenMar's exemption, given that the text of the provision is ambiguous, we must examine its legislative history. The passage of the PenMar statute in 1997 yields no relevant history. However, this provision (and much else in the PenMar statute) is modeled after a 1984 law that established the Maryland Economic Development Corporation (MEDCO). *See* Chapter 498, Laws of Maryland 1984, *codified as amended at* Article 83A, §5-201, *et seq.*[10] Hence, we consider the history of the MEDCO exemption, against the background of the Open Meetings Act as it then existed.

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[7] We express no opinion on the underlying policy issue whether PenMar and like entities ought to have the exemption.

[8] This section also requires a public body to adopt certain rules governing attendance and recording of its meetings and, in certain situations, authorizes disruptive individuals to be removed. §10-507(b) and (c).

[9] The General Assembly has granted several entities an exemption from the Act as a whole by declaring them not to be "public bodies" and therefore not subject to the Act. §10-502(h)(3)(v), (ix), and (x).

[10] The identical exemption from §10-507 appears in the statute governing the Bainbridge Development Corporation. Article 83A, §5-1609(a)(1)(ii).

C. History of the Exemption

The 1984 legislation establishing MEDCO granted an exemption from former Article 76A, §10 of the Code. This provision, in effect before the revision of the Open Meetings Act, provided:

> (a) Subject to the provisions of §9 ["Applicability of subtitle"], the meetings of every public body shall be open to the public unless closed in accordance with §11.
>
> (b) Members of the general public have the right to attend the open meetings of public bodies. A public body may remove or cause the removal of any person or persons from an open meeting upon a determination by the presiding officer of the public body that the person's behavior is disruptive to the meeting. The public body, its members, and its agents shall not be liable as the result of a removal for this reason unless they act maliciously.

Article 76A, §10 (1980 Rep. Vol.). Thus, MEDCO was exempted from both the Act's command that all meetings be open unless closed in accordance with one of the exceptions in the Act (then codified in §11) and, logically enough, from the corresponding grant of a right to the public to attend open meetings.

During the same legislative session, as part of the ongoing process to completely revise the Maryland Code (without making substantive changes), the Open Meetings Act was recodified. *See* Chapters 284 and 285, Laws of Maryland 1984. In the recodified Open Meetings Act, the command that all meetings be open unless closed in accordance with one of the exceptions in the Act appears in §10-505. The general right to the public to attend open meetings is now stated in a separate provision, §10-507(a).

Because of the recodification of the Act, the exemption in the MEDCO legislation also needed to be revised, so that it would contain an updated cross reference. As drafted, however, the MEDCO exemption was limited to §10-507 in the recodified Act. This was a mistake. The MEDCO language, after the Act's recodification, actually should have referred to both §10-505 and §10-507, because the substance of both of these provisions was contained in the prior section from which MEDCO was exempt.

As this history demonstrates, the General Assembly intended to exempt MEDCO – and other economic development agencies, like PenMar, whose statutes contain an exemption modeled on MEDCO's – from the requirement that meetings ordinarily be open to the public. Considering the objectives and powers of MEDCO and like entities, the General Assembly appears to have determined that the public

policy declaration in favor of open meetings, presently set forth in §10-501(a), was inapposite. Therefore, the limited exceptions under which a meeting might be closed under the Act, and procedural requirements intrinsic to the invoking of those exceptions, do not apply. However, other procedural requirements of the Act do apply because, as we have pointed out, the exemption is not a blanket one.[11]

D. Application of the Exemption

The PenMar statutory exemption, modeled after MEDCO's, must be interpreted in this light. The practical effect of the exemption granted PenMar, in our view, is as follows:

- PenMar must give notice in advance of its meetings in accordance with §10-506.

- Although PenMar may open a meeting to the public by application of its bylaws or voluntarily, it is not required by the Act to do so. Hence, there is no right under the Act for members of the public to attend PenMar meetings.

- Subject to a limited exception, the statutory justifications for a closed meeting and the procedural requirements to close a meeting under §10-508 do not apply.

- To ensure that a majority of the PenMar board supports the closing of a meeting, a vote must be conducted in accordance with §10-508(d)(1). Unlike other public bodies subject to the Act, however, this vote need not occur in open session, because the exemption means that PenMar is never required by the Act to open a meeting, no matter what the board is doing.

- PenMar is required to keep minutes of its meetings, §10-509(b) and (c)(1).

- If a closed meeting is conducted, the minutes are not publically available unless the minutes either are required to be made public or are voluntarily made public under §10-509(c)(4).

- Following a closed session, the meetings of PenMar's next public meeting must include the information required under §10-509(c)(2),

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[11] MEDCO was enacted as an Administration initiative. There is evidence in the legislative history file that the Governor's legislative office intended that MEDCO be granted a blanket exemption from the Open Meetings Act, but amendments that would have accomplished this result were never incorporated into the bill. *See* legislative history files on Senate Bill 485 and House Bill 678 (1984).

> other than a citation of authority for closing the session under §10-508(a). PenMar's exemption excuses it from identifying a basis under §10-508(a) for closing a meeting.

With this guidance in mind, we turn to the substantive allegations of your complaints.[12]

III

June 29 Meeting

A. Notice Generally

As noted above, PenMar is subject to many of the procedural requirements of the Open Meetings Act. Among the Act's requirements is that a public body provide "reasonable advance notice" of any meeting subject to the Act, regardless of whether that meeting will be open or closed. §10-506(a). "Whenever reasonable," notice is to be provided in writing, and the Act prescribes certain minimal information that is to be included. §10-506(b). The Act grants public bodies considerable flexibility in terms of the method of giving notice:

> A public body may give the notice under this section as follows:
>
> (1) if the public body is a unit of the State government, by publication in the Maryland Register;
>
> (2) by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part;
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> (3) if the public body previously has given public notice that this method will be used, by posting or depositing the notice at a convenient public location at or near the place of the session; or
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> (4) by any other reasonable method.

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[12] While your complaints raised multiple questions, we consider them within the context of what apparently occurred. We decline to address certain issues that appear unrelated to what occurred or that suggested procedures which are simply not required by the Act. For example, there is no merit to the suggestion that a public body must reconvene in open session at the end of a closed meeting or that a public body is precluded from voting in a closed session, provided it is done in accordance with the procedural requirements of the Act.

§10-506(c). In terms of the length of advance notice, the Attorney General has recommended that notice should be given as soon as practicable after a public body has scheduled the date, time, and location of its next meeting. Office of the Attorney General, *Open Meetings Act Manual* p. 18 (4th ed. 2000).

The second method of notice, "delivery to representatives of the news media," requires an affirmative act of transferring or giving over something (here, notice) to another. *Black's Law Dictionary* 461 (8th ed. 2004). The mere fact that a reporter learns about a meeting does not by itself mean that a public body has carried out its obligation under this provision. The reporter must have learned about the meeting as a result of the public body's delivery of notice.

It is obvious that the local newspaper, the *Herald-Mail*, knew about PenMar's June 29 meeting in advance, because on June 26 a reporter wrote an article about the impending meeting. What is not obvious is how the reporter learned about the meeting. PenMar's response states that the meeting "was announced to the local media on June 25." This phrasing, while hardly explicit about the manner of the announcement, implies delivery of some kind of notice to the media generally. The version of the facts presented in the supplement to the complaint, on the other hand, is that the only communication about the meeting from PenMar occurred in a conversation initiated by the reporter, after she had learned of the meeting from her own source. If that is so, a violation occurred, because it was PenMar's obligation to give the required notice, not passively wait until a reporter learned of the meeting independently.

We cannot reach a conclusion, because we cannot resolve the seeming discrepancy between the complaint's account of the facts and PenMar's. The Compliance Board is not an investigatory body that might independently determine disputed facts. *See, e.g.*, 3 *OMCB Opinions* 136, 138 (2001) (Opinion 01-12).

B. Closed Session Procedures and Minutes

Following our receipt of PenMar's response, and before our evaluation of the application of the Act to PenMar, we had asked PenMar to specifically address whether the procedural requirements of the Open Meeting Act were followed in the closing of the June 29 meeting. We also requested a copy of the minutes of PenMar's subsequent meeting, to evaluate the information that must be made public after a closed meeting. §10-509(c)(2). In response, PenMar provided a copy of its minutes of its meeting, June 29.

PenMar provided no evidence that the written statement normally required under §10-508(d)(2)(ii) in advance of a closed session was completed. However, as explained under Part IID above, in PenMar's case no such statement is required. The minutes reflect a motion "to convene in closed session ... to discuss matters as permitted in Section 10-508 ..." and indicate that, during the course of the closed session, "the board discussed one (1) matter to consider the acquisition of real

property for a public purpose and matters directly related thereto." After reconvening in open session, the minutes reflect adoption of a motion "based on discussions during the closed session" that PenMar authorize its "Negotiating Committee to finalize the contract with [Corporate Office Properties Trust] and to authorize the officers to execute that contract barring no material changes." The minutes also named those present during the course of the closed session.

Because PenMar was not required to justify a reason to conduct a closed session, there is no basis under the Act for us to consider the subject matter of the closed session. However, as noted above, PenMar is required to include certain information about each closed session in the minutes of its next session that it opens to the public. The minutes of PenMar's June 29 meeting suggest that PenMar intended to provide the information required subsequent to a closed session in the minutes of that date. We have previously approved this practice, provided that the required information is included, since the practical effort is to make the required information publically available at an earlier date. *See, e.g.,* 3 *OMCB Opinions* 264, 270 (2003) (Opinion 03-4). Furthermore, if PenMar makes the minutes of its June 29 meeting publically available, the minutes appear to satisfy the disclosure requirements under §10-509(c)(2), other than the need to cite statutory authority for the closed session, which, as we have concluded, does not apply.

IV

July 26 Meeting

The complaint about the July 26 meeting also questioned whether the notice of the meeting satisfied the Act, both as to the content of the notice as well as the manner in which notice was posted. As noted by PenMar in its response, the notice was drafted to ensure that the public was aware that the meeting would not be open in order that they "would not waste time and effort" in attending a meeting that would be closed.

The notice requirements of the Act provide that the notice "include the date, time, and place of the session" and "if appropriate, include a statement that a part or all of a meeting may be conducted in closed session." §10-506(b)(2) and (3). In PenMar's case, the public need not be given the option to attend any portion of any meeting. PenMar's notice announced exactly what it intended: PenMar did not intend to allow the public to observe the July 26 meeting. Considering PenMar's statutory exemption, we conclude that the notice's content did not violate the Act.

According to the complaint, notice of the July 26 meeting consisted of a single sign, posted at PenMar's headquarters. The complaint asked: "Considering that [PenMar has] traditionally posted [notice of] public meetings ... throughout the community, should [PenMar] be required to at least post a sign that is more readily accessible in a location that will ensure maximum participation?" Other than suggesting that notice was given in compliance with the Act, PenMar did not address the actual method by which notice was provided in advance of the July 26 meeting.

As discussed under Part IIIA above, the Open Meetings Act grants public bodies considerable flexibility in terms of the method of giving notice. One option under the statute is to post notice at a convenient public location at or near the location of the meeting "if the public body previously has given notice that this method will be used." §10-506(c)(3). Posting a notice is easy and convenient for a public body. But it is only a lawful means of notice if interested persons have previously been told where to look.

Considering PenMar's failure to specifically address this part of the complaint, we are unable to determine whether the method used by PenMar to provide notice of the July 26 meeting, a posted sign in a particular location, was consistent with any previous announcement about use of posted meeting notices. If so, PenMar complied with the Act; if not, it failed to comply.

V

Conclusion

We find that, in general, the provisions of the Open Meetings Act allowing public attendance at meetings and restricting the reasons under which a meeting might be closed are not applicable to PenMar. Other procedural requirements of the Act are applicable.

We find that, more specifically, if the minutes of the June 29 meeting are available to the public, the information included appears to satisfy the disclosure requirements for a closed meeting under the Act, to the extent that these requirements apply to PenMar. Considering PenMar's statutory exemption, we conclude that the content of the notice of the July 26 meeting did not violate the Act. However, based on the record before us, we are unable to reach a conclusion whether (i) proper notice to the news media was given of the June 29 meeting or (ii) the method used to give notice of the July 26 meeting satisfied the Act.

OPEN MEETINGS COMPLIANCE BOARD

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